SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1941

No. 1282

S. J. SUMMERS, ET AL,
Petitioners,

vs.

CLARE PURCELL, ET AL,
Respondents.

BRIEF IN OPPOSITION TO THE GRANT OF WRIT OF CERTIORARI

I.

THE OPINION OF THE COURT BELOW

1. The opinion of the Circuit Court of Appeals for the Fourth Circuit is to be found in the Transcript of the Record, pp. 74-81, and is published in 126 Fed. 2d, 390.

2. The date of the decision sought to be reviewed is March 9, 1942 (R. 81).

II.

The statutory provision believed to have conferred jurisdiction on the District Court of the United States for the Eastern District of South Carolina to entertain the suit of respondents therein, is the Federal Declaratory Judgment Act of June 14, 1934 (U. S. C. Title 28, Section 400).

III.

Respondents' statement of the case is to be found on pages 2-7 of their response to the Petition for Certiorari herein. In the interest of brevity, that statement is not here repeated, but it is referred to, with the request that it be considered as here repeated by reference.

IV.

SUMMARY OF THE ARGUMENT

1. There is no identity of parties, subject matter or objects to be obtained in the Federal and State cases, and consequently no conflict of jurisdiction.

2. The alleged *in rem* nature of the State cases does not deprive the Federal Court of jurisdiction, the Federal case being an action *in personam*, and especially because the Circuit Court of Appeals protected the State Courts from any possible interference on account of any judgment in the Federal case.

3. The requisite jurisdictional amount was involved in the Federal case, the members of The Methodist Church being the ultimate beneficiaries, usees and equitable owners of all property held by its trustees, boards, commissions or corporations for its use and benefit.

4. No particular description of specific properties was necessary in the Federal case, but if a specific description of any of the properties was necessary there was a sufficient description of sufficient property to overwhelmingly support jurisdiction.

5. The value of the right involved, in good faith alleged to be many times the requisite jurisdictional amount amply supports jurisdiction.

6. The Methodist Church has the equitable right to the exclusive use of the name "Methodist Episcopal Church, South," which is a property right alleged to be of a value more than $3,000, and the prayers for injunction against its use by the defendants being an action *in personam* and a separable issue in the case, the Federal and State Courts had concurrent jurisdiction even if the parties had been the same.

7. *Fussell v. Hail* distinguished and not a controlling authority on any issue in this case.

8. The Bishops, who are the complainants in the Federal case, were qualified as members of The Methodist Church to sue as the representatives of the membership of the denomination.

9. The legal principles here involved are similar to those presented in *Landrith v. Hudgins,* 121 Tenn. 556 and *Helm v. Zarecor,* 213 Fed. 648, in the latter of which cases it was held that the pendency of the State case did not deprive the Federal Court of jurisdiction.

10. An action between the residents of a single State involving a local property in that State does not deprive the Federal Courts of jurisdiction of an action by non-residents involving rights in property located in all the States, such a suit by non-residents transcends all local controversies.

11. The amplified remedial powers of the Federal Courts under the Federal Declaratory Judgment Act gives jurisdiction to relieve against insecurity, threatened injury and to avoid a multiplicity of suits, and this case is an ideal one for the exercise by the Federal Court of its jurisdiction under the Declaratory Judgment Act.

12. No sufficient grounds for granting the writ of certiorari in this case.

V.

ARGUMENT

1.

CASE CONSIDERED AS TO PARTIES, SUBJECT MATTER AND LEGAL PRINCIPLES INVOLVED

We submit that there was no identity of parties or subject matter in the Federal and State cases, and consequently there could be no conflict of jurisdiction. To prevent unnecessary repetition, we here refer to that portion of the Preliminary Statement of the matters involved in our response to the petition for certiorari in this case, which refers to the parties and subject matters involved in the State and Federal cases (pp. 2 to 7 of the Response).

We submit that the general properties and the conduct of the general work of the denomination were not involved in the State cases, each of the State cases being a purely local case, seeking special relief in a purely local matter.

Respondents respectfully submit that it is obvious that the object of the Federal suit was the protection of the whole denominational structure of The Methodist Church and the protection of the general funds and properties of the united church devoted to its general denominational work.

The question of the validity of union was directly involved in the Federal case and was incidentally but necessarily involved in the State cases, but this constitutes no reason why the cases could not proceed concurrently in the State and Federal Courts. The rule of *Peck v. Jennis*, 7

Howard, 624, and *Freeman v. Howe,* 24 Howard, 450, was early modified by *Buck v. Colbath,* 3 Wall. 334 and by *Watson v. Jones,* 80 U. S. 679, to the extent that the court first acquiring jurisdiction does not necessarily acquire the exclusive right to decide every question involved in the case first filed. *Moran v. Sturgess,* 154 U. S. 256; *Empire Trust Co. v. Brooks,* 232 Fed. 641; *Maryland Casualty Co. v. Board of Water Commissioners,* 27 Fed. (2d) 142.

In *Buck v. Colbath,* 3 Wall. 334, this Court held:

> "The rule that among courts of concurrent jurisdiction that the one which first obtains jurisdiction of a case has the exclusive right to decide every question arising in the case is subject to some limitations; and is confined to suits between the same parties, or privies, seeking the same relief or remedy, and to such questions or propositions as arise ordinarily and properly in the suit first brought; and does not extend to all questions which may by possibility be involved in it."

In *Hunt v. N. Y. Cotton Exchange,* 205 U. S. 322, the Court held:

> "The fact that defendant has, in another action in the state court, and to which the exchange was not a party, obtained an injunction against the telegraph company, enjoining it from ceasing to deliver the quotations, does not deprive the Circuit Court of jurisdiction of the suit by the exchange under Sec. 720, Rev. Stat., the parties and the purpose not being the same."

The legal principles involved, the cause of action, the relations of the parties and the objectives sought in the case at bar are substantially the same as in the case of *Watson v. Jones,* 80 U. S. 679. The opinion in that case is, in part, as follows:

> "In regard to the suit in the chancery court of Louisville, which the defendants allege to be pending, there

can be no doubt but that that court is one competent to entertain jurisdiction of all matters set up in the present suit. As to those matters, and to the parties, it is a court of concurrent jurisdiction with the Circuit Court of the United States, and as between those courts the rule is applicable that the one which has first obtained jurisdiction in a given case must retain it exclusively until it disposes of it by a final judgment or decree.

"But when the pendency of such a suit is set up to defeat another, the case must be the same. There must be the same parties or, at least, such as represent the same interest, there must be the same rights asserted, and the same relief prayed for. This relief must be founded on the same facts, and the title or essential basis of the relief sought must be the same. The identity in these particulars should be such that if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties." * * *

"The pleadings in the present suit show conclusively a different state of facts, different issues, and a different relief sought. This is a case of a division or schism in a church. It is a question as to which of two bodies shall be recognized as the Third or Walnut Street Presbyterian Church. There is a controversy as to the authority of Watson and Gault to act as ruling elders, that authority being denied in the bill of the complainants; and, so far from the claim of Avery, McNaughtan, and Leach to be ruling elders being the sole inquiry in this case, it is a very subordinate matter, and it depends upon facts and circumstances altogether different from those set up and relied on in the other suit, and which did not exist when it was brought. The issue here is no longer a mere question of eldership, but it is a separation of the original church members and officers into two distinct bodies, with distinct members and officers, each claiming to be the true Walnut Street Presbyterian Church, and denying the right of the other to any such claim. This brief state-

ment of the issues in the two suits leaves no room for argument to show that the pendency of the first cannot be pleaded either in bar or in abatement of the second."

In *Helm v. Zarecor,* 213 Fed. 648, the opinion of the Court reads, in part, at page 653, as follows:

"The main issue thus presented by the bill is not, in my opinion, *res adjudicata* by reason of the adjudication in the quo warranto proceedings in the case of State ex rel. v. W. A. Provine, et al. Those proceedings were pending in the Chancery Court of Davidson County, Tennessee, when the second plea to the jurisdiction was filed, and were set up and relied upon in said plea. In passing upon this plea in my memorandum opinion of March 26, 1910, I said:

" 'Obviously the bill goes further than to seek merely a decree as to who are the true and lawful members of the corporation, which is the only matter involved in the above named quo warranto proceedings, and seeks a decree broadly declaring the trust upon which the property of the corporation is held, and the use and purpose for which it is to be administered by such persons as may be its true and lawful members.' "

Again in *Helm v. Zarecor,* (U. S.) supra, the Supreme Court said:

"The second plea was overruled because it did not reach the whole case made by the bill, as the bill did not merely ask a determination as to the persons who were the true and lawful members of the corporation, which was the only matter involved in the quo warranto proceeding in the state court, but sought a decree declaring the trust upon which the property of the corporation is held and the uses and purposes for which it is to be administered, whoever might be found to be the true and lawful members of the corporation. We need add nothing to what was said by the court below upon these points."

2.

THE ALLEGED IN REM NATURE OF THE STATE CASES DID NOT DEPRIVE THE FEDERAL COURT OF JURISDICTION

We insist that the District Court, after finding that there was a diversity of citizenship, the requisite jurisdictional amount, an actual controversy and that, if the court had jurisdiction, the Federal case presented a controversy which should be determined under the Declaratory Judgment Act of Congress (R. 81), erred in holding that the parties and the causes of action in the State and Federal Courts were substantially the same and that the cases pending in the State Courts were, as the court construed them, actions *in rem;* and consequently that their pendency deprived the Federal Court of jurisdiction, and for that reason dismissing the action in the Federal Court upon the sole ground of a conflict of jurisdiction between the State and Federal Courts.

Until advised by the decision of the Circuit Court of Appeals, respondents did not consider the actions in the State Courts, whatever their technical classification might be, as such actions *in rem* as precluded the State and Federal Courts of concurrent jurisdiction. In so far as the Pine Grove case, which is typical of all the State cases, sought a removal of a cloud upon the title of the local church property by a cancellation of the alienating deed, respondents construed the action as one *in personam* under the authority of *Hart v. Sanson,* 110 U. S. 151. In so far as the State cases sought injunctive relief against interference with the religious services, and so far as both the Federal and State cases sought injunctive relief against the use by the defendants of the name "Methodist Episcopal Church, South," they were clearly actions *in personam*, and under the rule

in *Kline v. Burke Construction Co.*, 260 U. S. 226, the State and Federal actions could proceed concurrently. But the Circuit Court of Appeals having, by the terms of its decision, limited the District Court only to the "grant of any relief appropriate under the pleadings which will not interfere with the specific properties which have been brought within the jurisdiction of the State Courts," the question of conflict of jurisdiction in this case between the State and Federal Courts has been eliminated.

3.

THE JURISDICTIONAL AMOUNT INVOLVED

The question of a conflict of jurisdiction on account of the *in rem* nature of the State cases being eliminated, diversity of citizenship being admitted, the existence of an actual cognizable controversy not being controverted, the sole remaining attack on the jurisdiction of the Federal Court is the contention that the requisite jurisdictional amount is not involved. Petitioners base this contention, first, upon the contention that The Methodist Church is a voluntary association and, as such, is incapable of owning property.

It is true that the Methodist Episcopal Church, South, was, and The Methodist Church is, an unincorporated, voluntary association. Whatever incapacity may exist by reason of this fact, the members of the Methodist Episcopal Church, South, were, before the union, the ultimate beneficiaries, usees and equitable owners of all property, the legal title of which was held by its trustees. The same is true of The Methodist Church. As an illustration of the equitable ownership by the members of the Methodist Episcopal Church, South, the complaint in the Federal case alleged that:

> "At the time of the union of the Methodist Episcopal Church, South, with the other two churches, the

value of the property owned by the Methodist Episcopal Church, South, and held by trustees, boards, commissions and other agencies of such church, for its use and benefit, including local churches, parsonages, hospitals, educational institutions and publishing houses, was approximately $400,000,000.00. The Discipline of the Methodist Episcopal Church, South, contained a provision that every charter, devise, deed or conveyance for any house of worship to be used by said Church should contain a trust clause as follows: 'In trust to be used, kept, maintained and disposed of as a place of divine worship, for the use of the ministry and membership of the Methodist Episcopal Church, South, subject to the Discipline, usage and ministerial appointments, as from time to time authorized and declared by the General Conference of said Church and by the Annual Conference within whose bounds said premises are located.' "

The members of The Methodist Church are alleged to be invested with a like ownership.

We submit that the situation here with reference to the beneficial interest of the members of the denomination in property for carrying on the denominational work of the church is exactly similar to the interest of the Presbyterian Church in the U. S. A., which supported the right of the membership of that church to maintain the case of *Helm v. Zarecor,* 213 Fed. 648; 222 U. S. 32. In *Smith v. Swormstedt,* 16 Howard, 288, growing out of the division of the Methodist Episcopal Church, the existence of a "common property belonging to the ecclesiastical organization" is recognized.

In *Barkley v. Hayes,* 208 Fed. 319, it was held that:

"A member of the Presbyterian Church or of the Cumberland Presbyterian Church, under their form of organization, has no individual ownership in any property of the church which has been purchased by it or conveyed to it for the general use of the congre-

gation or for a general use for religious purposes, nor has the congregation which uses it, but the same is vested in the general church, which through its general assembly has the ultimate power of control, although the conveyance may have been made to the trustees of the particular denomination."

This case, with others consolidated with it, was carried to the Circuit Court of Appeals for the Eighth Circuit, which affirmed the judgment of the District Court and held (222 Fed. 669) that:

> "The agreement of union between the Presbyterian Church in the U. S. A., and the Cumberland Presbyterian Church entered into on May 24, 1906, was legal and valid, and *vested the united church with all property rights of the two constituent organizations.*" (Italics ours.)

The judgment of the Circuit Court of Appeals, in *Barkley v. Hayes,* was affirmed by this Court in 247 U. S., p. 1. See also *Brown v. Clark,* 116 S. W. 360.

Respondents respectfully submit that no principle of American law is better established than that the ultimate beneficial ownership of property held by trustees, or by boards, corporations or commissions for holding and administering property for the protection of the denominational work of a connectional church is in the total membership of the denomination.

4.

NO PARTICULAR DESCRIPTION OF SPECIFIC PROPERTIES NECESSARY IN FEDERAL CASE

Notwithstanding the allegation of the complaint in the Federal case that the Methodist Episcopal Church, South, at the time of union owned property of the approximate

value of $400,000,000 and that The Methodist Church, after the union, owned property of the value of $656,000,000, petitioners for certiorari contend that these allegations cannot be considered because there is no particular description of the properties owned by these churches, its 139 educational institutions, its 83 hospitals, its 115 homes for children, aged persons and young people. Respondents insist that to require a description of each piece of property owned and a bill of particulars of the securities in which its permanent funds and the endowment of its institutions are invested would be to require an impossibility, and the nature of the case and the Rules of Federal Procedure do not require it. The plaintiffs' complaint in the Federal Court sought a broad declaration of the rights of the members of The Methodist Church in *all* of the property claimed to be owned by reason of the entry of the Methodist Episcopal Church, South, into the union. Respondents' complaint was in opposition to the claim of the defendants to *all* of the property owned by the Methodist Episcopal Church, South, at the time of union. The complaint in the Federal case did not seek to remove a cloud from any specific item of property owned by The Methodist Church, but the declaration of the invalidity of a claim asserted which cast a cloud upon all of it and the prevention of the invasion of its rights in any of it. No better description could be given of its permanent funds than the allegation that they amounted to $14,132,961.73, and we submit that this definite allegation alone is a sufficient allegation to allege the jurisdictional amount involved.

5.

THE VALUE OF THE RIGHT INVOLVED

Petitioners, in their brief, recognize the established rule that the jurisdictional amount is determined by the value

of the right which the plaintiffs seek to protect in the controversy. In *Board of Trade v. Cella*, 145 Fed. 28, the court held that the Chicago Board of Trade had a property right in the quotations made and posted in its exchange and, in determining the jurisdictional amount, held:

> "In a suit to enjoin a threatened or continued commission of certain acts, the amount or value involved, for the purpose of determining the jurisdiction of a federal court is that the value of the right which complainant seeks to protect from invasion, and not the sum he might recover in an action at law for the damage already sustained; nor is he required to wait until it reaches the jurisdictional amount."

We submit that the contentions of the petitioners in this case are controlled adversely to petitioners by the decision of this Court in *Hunt v. N. Y. Stock Exchange*, 205 U. S. 322. That case came to this Court, like the instant case, upon a plea to the jurisdiction of the Federal Court, based upon the contention that the requisite jurisdictional amount was not involved, and upon a plea in bar on account of the pendency of a cause in a state court, believed to involve the same subject matter. The right involved was the right of the exchange to control the distribution of its quotations. The Superintendent of the Exchange testified that the value of the right was determnied by the amount paid it by the Western Union Telegraph Company for the exclusive right to receive and transmit to its patrons, qualified to receive them, these quotations, which was the sum of $13,584 per annum. Hunt, who received these quotations from the telegraph company up to a certain time for a monthly payment of $25, contended that that sum was the value of the right. His contention was overruled by the lower court, and on appeal to this Court, the lower court was affirmed, this Court holding:

"It is manifest that the injury to the Exchange is not the rate paid by the appellant to the Telegraph Company. The purpose of the suit is to enjoin the appellant from receiving, using or selling, directly or indirectly, the Exchange's quotations or permitting or maintaining any wire to his office over which the quotations are passing, or distributing the quotations, until he shall have acquired the right to receive them either by contract of purchase from the Exchange, or with its consent and approval, from one of the Telegraph Companies authorized to distribute them. In other words, the object of the suit is to keep the control of the quotations by the Exchange and its protection from the competition of bucket shops or the identity of its business with that of bucket shops. And the right to the quotations was declared, as we said in *Board of Trade v. Christie Grain & Stock Company*, to be property, and the Exchange may keep them to itself or communicate them to others. The object of this suit is to protect that right. The right, therefore, is the matter in dispute, and its value to the Exchange determines the jurisdiction, not the rate paid by appellant to the Telegraph Company. The value of the right was testified to be much greater than $2,000. In *Mississippi & Missouri R. R. Co. v. Ward*, 2 Black, 485, it was decided that jurisdiction is tested by the value of the object to be gained by the bill. To the same effect is *Board of Trade v. Cella Commission Co.*, 145 Fed. Rep. 28. In the latter suit the Chicago Board of Trade obtained a decree restraining the use of its continuous quotations by the Cella Commission Company. It was said that the amount or value of such right is not the sum a complainant might recover in an action at law for the damage already sustained, nor is he required to wait until it reaches the jurisdictional amount. The latter declaration is supported by *Scott v. Donnell*, 165 U. S. 107."

We submit that the right involved in the instant case is the right of The Methodist Church to own, use, occupy, control, manage and receive the proceeds of all of the prop-

erty of which its members are the equitable owners, including the property acquired from the Methodist Episcopal Church, South, by virtue of the union, and to apply the proceeds of its property and the contributions of its members to the religious purposes of the denomination. If no other allegation of a jurisdictional amount were considered, the allegation of the income received by The Methodist Church from its properties and the contributions of its members overwhelmingly supports jurisdiction.

Furthermore, we insist that a bill for a declaratory judgment, being in the nature of a bill *quia timet,* the jurisdictional amount is to be determined by the value of all of the property whose title is threatened.

6.

EQUITABLE RIGHT OF THE METHODIST CHURCH TO THE EXCLUSIVE USE OF THE NAME "METHODIST EPISCOPAL CHURCH, SOUTH"

Petitioners contend that a religious society has no good will; cannot be subjected to unfair competition; that these words express a concept of trade, commerce and business, and, that there is nothing in the complaint in the Federal case which indicates that The Methodist Church has not abandoned the use of the name "Methodist Episcopal Church, South."

We submit that it is a principle of law and equity universally recognized by the courts that any business organization, church, lodge, fraternal order or society which has adopted a name, operated under it and acquired a good will under its distinctive use, has the exclusive right of the use of such name and the right to prevent its use by another.

The name "Methodist Episcopal Church, South," was and is a property right and passed to its successor, The Methodist Church. Lord Blackburn in *Singer Mfg. Co. v. Loog*, L. R. A. cases, 15-33-1882, cited in *Nims on Unfair Competition and Trade-marks*, page 39, says:

> "I think it is settled by a series of cases of which *Hall v. Barrows* is, I think the leading case, that both trade-marks and trade-names are in a sense property, and the right to use them passes with the good will of the business to the successors of the firm that originally established them, even though the name of that firm be changed so that they are no longer strictly correct. This was evidently Lord Collentham's opinion in *Millington v. Fox*, and I know no authority against it."

In *Nims on Unfair Competition and Trade-marks* (3rd Ed.) page 240, under the title names of "Charitable Corporations," the author says:

> "The fact that a corporation is an eleemosynary or charitable one and has no good will to sell, and does not make money, does not take it out of the law of unfair competition. Distinct identity is just as important to such a company, oftentimes, as it is to a commercial company. Its financial credit, its ability to raise funds, and supporting it, are all at stake if its name is filched away by some other organization. The existence of two charitable organizations in one city, or even in one section of the country, both of which have names in which the words "Young Women's Christian Association" appear, could not but be a distinct injury to each other. *International Committee of Young Women's Christian Association v. Young Women's Christian Association of Chicago*, 194 Ill., p. 194, 62 N. E. 551; 56 L. R. A. 888; *Society of the War of 1812 v. Society of War of 1812 in the State of N. Y.*, 46 App. Div. (N. Y.) 568; 62 N. Y. Supp. 355.

> "There can be no monopoly in charitable activities. No one should be deprived of the luxury of doing good. But it is, it seems to me, a proper question always of methods. If the methods are improper or unfair, to the harm or detriment of others with established rights, even if the results are meritorious, such methods should be discouraged." Citing *Brooklyn Hebrew Home, etc., v. Jewish Home*, 117 Misc. (N. Y.) 347.

In the *Restatement of the Law of Torts*, by the American Law Institute, in Comment b, under Section 752, it is said:

> "Though one having a trade-mark or a trade name discontinues its use with the intention of abandoning it, he does not thereby authorize others to market their goods as his. If the trade-mark or trade name has considerable market reputation, it may continue for some time after the cessation of the use to be regarded in the market as identifying the goods, services or business of the person who discontinued the use. If he remains in business during that period, he is entitled to relief, under the rules stated in this topic, against others who use the trade-mark or trade name in a manner which thus confuses prospective purchasers."

Petitioners evidently construe the union as the annihilation of the "Methodist Episcopal Church, South," and the other churches who entered the union, and that they therefore "quit business" and abandoned their names. The uniting churches did not "quit business," abandon their names, nor were they annihilated by the union.

The principles of law governing the unfair use by one organization of the name of another are so well established that a citation of the authorities herein is not justified, but

a list of a number of such cases is printed in the margin for convenient reference if necessary.*

7.

THE CASE OF FUSSELL V. HAIL DISTINGUISHED

Petitioners rely strongly on the case of *Fussell v. Hail,* 84 N. E. 42. That case is not in any way analogous to the case at bar. That case was an action by members of the Cumberland Presbyterian Church to enjoin its General Assembly from bringing about union with the Presbyterian Church in the U. S. A. The Court held that the object of that suit was to have the court, by its process, take control of an ecclesiastical tribunal, examine the extent of its jurisdiction, examine the regularity of its proceedings and revise its judgments. The object of the instant case is to declare the right of the ecclesiastical bodies which formed the union of the churches for the protection of the property interests of The Methodist Church under the prin-

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*Benevolent & Protective Order of Elks v. Improved Benevolent & Protective Order of Elks of the World, L. R. A. (1915 B) p. 1074; Creswill v. Grand Lodge Knights of Pythias of Georgia, 133 Ga., 837; Knights of the Ku Klux Klan v. Independent Klan of America, 11 Fed. (2d) 881; Salvation Army in United States v. American Salvation Army, 120 N. Y. Supp. 741, on page 745; Society of the War of 1812 v. Society of War of 1812 in the State of N. Y., 62 N. Y. Supp. 355, (46 App. Div. 569); Brooklyn Hebrew Home for the Aged v. Brooklyn Hebrew Home for the Aged & Infirm, 192 N. Y. Supp. 301; International Committee of Young Women's Christian Association v. Young Women's Christian Association, Inc., 22 Ohio App. 300; National Circle Daughters of Isabella v. National Order, Daughters of Isabella, 270 Fed. 723; Independent Lodge of the World, Loyal Order of Moose v. Improved Benevolent Protective Order of Moose of the World, 123 At. 532; Talbot v. Independent Order of Owls, 220 Fed. 660; Lane v. Evening Star Society, 100 Ga., 355; Home Machine & Fdy. Co. v. Davis Machine & Fdy. Works, 135 Ga., 18; Industrial Inv. Co. v. Mitchell, 164 Ga., 437; Planters Fertilizer & Phosphate Co. v. Planters Fertilizer Co. (S. C.) 133 S. E. Rep. 706; Hudson Tire Co. v. Hudson Tire & Rubber Co., 276 Fed. 59; Wm. A. Rogers, Ltd. v. H. O. Rogers Silverware Co., 237 Fed. 887.

ciple enunciated in *Watson v. Jones,* 13 Wall. 272; *Sheppard v. Barkley,* 247 U. S. 1; first announced in the great South Carolina cases of *Harmon v. Dreher,* 2 Spier's Equity, 87 and *Wilson v. Presbyterian Church of Johns' Island,* 2 Rich. Eq. Rep. 192, followed and approved by the Supreme Court of South Carolina in *Morris Street Baptist Church v. Dart,* 67 S. C. 241.

It is true that the members of a religious society have no individual, proprietary interest in the property of the church to which they belong, but this does not mean that they do not have an equitable interest in the property appertaining to them as members and held in common with all other members of the denomination. When the church to which they belong, by its due processes, exercises its inherent right to unite with another religious society their membership is transferred to the new organization together with all of their equitable interests in the property of the church to which they belong, and they are thereby deprived of no property right. This was the extent of the ruling in *Fussell v. Hail,* supra.

In *Barkley v. Hayes,* 208 Fed. 319, involving rights of property claimed by members of the Cumberland Presbyterian Church after the union of that church with the Presbyterian Church in the U. S. A., the District Court for the Western District of Missouri held that:

> "A member of the Presbyterian Church or of the Cumberland Presbyterian Church, under their form of organization, has no individual ownership in any property of the church which has been purchased or conveyed for the general use of a congregation or for general use for religious purposes, nor has the congregation which uses it, but the same is vested in the general church, which through its general assembly has the ultimate power of control, although the conveyance may have been to the trustees of the particular congregation.

> "A Christian Church, in the absence of anything in its constitution to the contrary, has the inherent power to unite with another church, involving the surrender of the name and organization of one of them, when there is sufficient identity of faith to warrant their union."

This case, with others consolidated with it, was carried to the Circuit Court of Appeals of the Eighth Circuit, which affirmed the decision of the District Court and held (222 Fed. 669) that:

> "The agreement of union between the Presbyterian Church in the U. S. A., and the Cumberland Presbyterian Church, entered into on May 24, 1906, was legal and valid, and vested the united church with all property rights of the two constituent organizations."

Appeal was then taken to the Supreme Court of the United States, docketed here as *Shepard v. Barkley,* and affirmed (247 U. S. 1). In these cases there is an almost complete citation of the decisions of the American Courts on this subject. For lack of space these decisions are not herein cited, but reference is prayed to them, if the Court deems it necessary to consider them.

Fussell v. Hail, supra, properly understood, did not hold that the members of the Cumberland Presbyterian Church did not have *any* interest in the property of their church, but held that they did not have *"an interest in any property which will be in any way affected by the proposed union."*

In *Master v. Second Parish of Portland,* 124 Fed. (2d) 622, the court held that:

> "Under the Presbyterian system the First Presbyterian Society of Portland held legal title to the real estate but the whole beneficial interest belonged to the general church, not to the particular Park Street congregation."

If *Fussell v. Hail* is not to be understood as we have construed it, it is against the overwhelming weight of authority; is a single decision of a State Court and is not a valid authority on the question involved.

8.

BISHOPS PROPER PARTIES COMPLAINANTS

If it is necessary to be educated in the obvious, as Mr. Justice Holmes once said, we submit that a member of The Methodist Church loses none of his rights as a member by being elected a bishop, nor is he thereby any less qualified to represent the membership as a class in the protection of their rights in the property of the church. Indeed, it is the duty of a bishop to exercise special authority over the spiritual and temporal affairs of the church located within the bounds of his jurisdiction. (R. 31). The complainants in this case were specially authorized to bring this action by a resolution of the Unifying Conference, which represented the entire denomination, in the following terms:

> "RESOLVED, that we authorize the Bishops of a jurisdictional conference within which a suit or suits may be brought, if in their judgment it is proper to do so, to employ competent attorneys to protect the interests of The Methodist Church, local or general, in such property, or to cause such suit or suits to be brought as in their judgment may be necessary to protect the interest of The Methodist Church." (R. 32.)

It is obvious that they did not bring their complaint in the District Court to protect any interest in the property of the church peculiar to themselves, but brought it in the interest of all members of the church as a class.

The great case of *Smith v. Swormstedt,* 16 Howard, 288 was brought by certain travelling preachers of the Methodist Episcopal Church, South, by the authority, and under the direction of the general and annual conferences of the

Church, South, and for the benefit of the same, and all the preachers in the travelling connection, and all other ministers and persons having an interest in the property. This court held that the case was properly brought as a class suit.

Barkley v. Hayes, 208 Fed. 319, was brought by the "Moderator and stated clerk, who were respectively Chairman and Secretary of the Presbyterian Church in the United States of America, who acted individually and as such officers and representatives of the members of said Presbyterian Church," against certain members of those who claimed to form the Cumberland Presbyterian Church.

Helm v. Zarecor, 213 Fed. 648, was filed by certain ministers, ruling elders and laymen of the Presbyterian Church in the U. S. A., suing for themselves and all members of said church, against individuals . . . described as representing not only their own interests but also all members of the Cumberland Presbyterian Church.

In *Shannon v. Frost,* 3 Ben Monroe's Rep. (Ky.) 253, it is held "A committee of a church appointed for that purpose, may properly, as parties, litigate the rights of the church in the civil tribunals of the country."

The fact that there may be different orders, duties, dignities and rights among the members of a religious society does not militate against the right of any of the classes of members to sue as representatives of all of the members to protect a right in which they have a common interest.

Prof. Zollman, in his work on American Church Law (page 601), discussing the representation of a total interest of the membership where members of an unincorporated society having a different quantity or quality of interest sue in a representative suit, says:

> "That the members of the class have separate and distinct interests is no objection to such a suit, but it is a distinct advantage, as these persons are brought on

the record fairly representing all the rights and interests involved which can thus be fully and honestly tried. (1) A bill, therefore, will not be multifarious because the plaintiffs (the pastor, elders and certain members of the church) are interested in different ways in eliminating a common grievance. (2) The treasurer of such a society (3), its trustees, whether they are elected in the ordinary course by the congregation (4) or are appointed by the court (5), or even its elders and deacons (6) may act as plaintiffs on behalf of the whole membership. The principle even extends to the members of an incorporated synod. (7) Where incorporated societies are members they may fitly be represented in court by individual members. (8) The bill, of course, should be filed not only in behalf of the complainant but also in behalf of all other persons who are not directly made parties, so that they may come under the decree and take the benefit of it, or show that it is erroneous, or may ask for a rehearing (9), and will after it is terminated in a judgment estop the general body from litigating the same matter over again." (10)

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1. *Smith v. Swormstedt,* 16 Howard, 288, 303.
2. *Fuchs v. Meisel,* 102 Mich. 357; 60 N. W. 793; *Munsel v. Boyd,* 30 Ohio Cir. Ct. R. 182; *Brown v. Painter,* 3 Northam Co. Rep. (Pa.), 8 Montg. Co. Law Rept. 130.
3. *Smith v. Nelson,* 18 Vt. 511.
4. *Bates v. Houston,* 66 Ga., 198; *Trustees of Methodist Episcopal Church of Jefferson,* 4 Or. 76, 77; *Unangst v. Shortz,* 5 Whart. (Pa.) 506.
5. *Bates v. Houston,* 66 Ga., 198.
6. *Elders and Deacons of First Freewill Baptist Church, etc., v. Bancroft,* 4 Cush. 281.
7. *Trustees of Associated Reformed Church v. Trustees of Theological Seminary at Princeton,* 4 N. J. Eq. 77, 100.
8. *Mannix v. Purcell,* 46 Ohio St. 102; 2 L. R. A. 753.
9. *Whitney v. Mayo,* 15 Ill. 251, 255.
10. *Appeal of Third Reformed Dutch Church,* 88 Pa. 503.

Hence, we insist that, if the bishops had a special interest in the property of the church, this would not have disqualified them from suing as the representatives of all members of the church, but they do not have, and they do not assert any special interest, but they sue for the protection of the common beneficial interest of all members of the church.

9.

THE LEGAL SITUATION HERE PRESENTED

The legal situation presented to the Circuit Court of Appeals in this case was substantially the same as that presented by the state case of *Landrith v. Hudgins* (121 Tenn. 556; 120 S. W. 783), which was a quo warranto proceeding to test the right to hold office as a member of the Board of Publication of the Cumberland Presbyterian Church, this right depending upon the validity of the union of the Cumberland Church with the Presbyterian Church in the U. S. A., and the Federal case of *Helm v. Zarecor* (213 Fed. 618), which was a suit filed in the District Court for the Middle District of Tennessee by members of the Presbyterian Church in the U. S. A. on behalf of themselves and all other members of the Cumberland Presbyterian Church, as representing all members of that church who refused to recognize the union of the churches and claiming that the Cumberland Presbyterian Church was still a separate association with all its original powers . . . for the purpose of obtaining a decree that the united church had become vested with the right to use and control certain property belonging to the Cumberland Church before the union, and to use it in its denominational work. A few days before the Federal case was filed the Supreme Court of Tennessee, in *Landrith v. Hudgins,* held that the union of the churches was not valid. This judgment was pleaded in abatement in the Federal case. The Supreme Court of the United States,

on an appeal of the judgment, in the case of *Helm v. Zarecor*, 222 U. S. 32, held:

> "It is thus evident that the controversy transcends the rivalry of those claiming membership in the Board and the assertion of rights inhering in that corporation itself. It embraces the fundamental question of the rights of these religious associations said to be represented by the respective parties to use and control the corporate agency and have same to the benefit of their denominational work of the corporate property. Viewed in this aspect the relation of the corporation to the controversy is not to be determined by the attitude of alleged members of the board who believe the union to have been consummated, nor by the fact it does not appear that they have surrendered possession. These do not suffice to identify the interests of the corporation with that of the complaint."

On a retrial of the case in the Federal Court (213 Fed. 648), the plea in abatement was overruled, and on the petition for rehearing Judge Sanford held:

> "I do not think that the entire membership of both the Presbyterian Church in the U. S. A., and the Cumberland Presbyterian Church are shown to have such an interest in the specific church property involved in *Landrith v. Hudgins* as to make that suit properly a class suit binding on members of both churches throughout the United States, or upon any other persons than members of the particular church whose property was in question therein, and in reference to the beneficial ownership of such property.
>
> "Furthermore, the defendants' contention in reference to the effect of the quo warranto proceeding cannot be sustained in the light of the construction placed upon the issues in said quo warranto proceeding in the opinion of the Supreme Court of the United States, in Helm v. Zarecor, 222 U. S. 32, and for the reasons heretofore stated in my former opinion."

In the State Court cases involved in the appeal in this case, it is obvious that it was for the protection of a special and local interest in the Pine Grove Church that the plaintiffs in said State Court case filed their action.

On the other hand the plaintiffs in the Federal Court suit sued for the protection of the interests of the whole denomination; that is, that the whole system of church government should remain intact. The members of a local church, as such, have no right or duty to look after the general government and affairs of the church, as a whole, but the bishops acting under the authoritry of the general conference, and in behalf of all of the members of the denomination, do have that duty and right. We, therefore, insist that a judgment in the *Pine Grove case* would not be res judicata of the issues in the Federal case.

10.

CASE TRANSCENDS ALL LOCAL CONTROVERSIES

Great connectional churches, such as the Presbyterian, Episcopal and Methodist churches, cannot exist as such if they are subject to be broken up by diverse decisions of the courts of different states. They must exist above the civil law and independent of it, or some general rule of law must be found by which the questions affecting the integrity of their organizations are to be adjudicated. Such a general law exists and its exposition is to be found in such cases as, *Watson v. Jones,* 13 Wall. 272, and *Shepard v. Barkley,* 247 U. S. 1; first announced in the great South Carolina cases of *Harmon v. Dreher,* 2 Spier's Eq. 87, and *Wilson v. Presbyterian Church of Johns' Island,* 2 Rich. Eq. Reports, 192, followed and approved by the Supreme Court of South Carolina in *Morris Street Baptist Church v. Dart,* 67 S. C. 241. The Courts of the State of South Carolina being without authority to grant declaratory judgments, cannot ad-

judicate upon questions referable for decision to this general law except when such questions may be incidentally involved in a local contest involving a property right with respect to property located in that state. The Federal Courts under the Declaratory Judgment Act of Congress do have the right to adjudicate directly upon such questions under the circumstances existing when the Federal case involved in this appeal was filed. The necessity of applying general principles of law in cases like this was recognized by Judge Van Valkenburg in *Barkley v. Hayes*, 208 Fed. 320, involving the validity of the union of the Presbyterian Church in the U. S. A. In that case it appeared that in many states the union had been upheld but that the Supreme Court of Missouri in the case of *Boyles v. Roberts*, 222 Mo. 613, had held to the contrary. The learned judge held in *Barkley v. Hayes*, supra, that:

> "A single decision of the Supreme Court of a state upon a question of property rights growing out of such church union cannot be held conclusive on a federal court as to property in such state in a suit between different parties and involving different property; the question being one of general law *and involving property in all states.*" (Italics ours.)

This case with others consolidated with it was carried to the Circuit Court of Appeals and affirmed (222 Fed. 669), and from the Circuit Court of Appeals to the Supreme Court of the United States, docketed there as *Sheppard v. Barkley*, and there affirmed (247 U. S. 1). We have previously called attention to the fact that the Supreme Court of the United States held, substantially, to the same effect in *Helm v. Zarecor* (213 Fed. 648).

There is nothing in the case of *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, which impaired the right of the Federal Court to decide this case. That case merely gave a new rule

of decision. The rule of decision in this case had already been laid down in the South Carolina cases of *Harmon v. Dreher, Wilson v. Presbyterian Church of Johns' Island,* and *Morris Street Baptist Church v. Dart,* supra, and by the Supreme Court of the United States in *Watson v. Jones,* supra.

The Federal Courts are not yet so manacled that a local dispute over a local matter involving a local interest can deprive eight million people, some of whom reside in every state in the union, of their right to have adjudicated in them a question affecting all of them and which overleaps all state lines.

II.

AMPLIFIED REMEDIAL POWERS OF FEDERAL COURTS UNDER FEDERAL DECLARATORY JUDGMENT ACT

We need hardly mention the fact that all of the cases cited up to this point were decided under the law as it existed before the remedial powers of the Federal Courts were amplified by the Federal Declaratory Judgment Act and their procedure simplified by the existing Rules of Federal Procedure.

Professor Borchard in his work on Declaratory Judgments (Preface to First Edition, XVI) says:

> "The general recognition of the declaratory action as a procedural institution has thus opened the door to the adjudication of innumerable complaints and controversies either (a) not theretofore capable of judicial relief, and (b) not theretofore prosecuted except for coercive relief. The first type represents cases in which the petitioner seeks relief from peril and insecurity; the second, cases in which the petitioner is sat-

> isfied with a mild yet effective remedy, which adequately serves his purpose. The declaration, by narrowing the issue in dispute and by its direct approach to the substantive goal will make unnecessary the persistent abuse of the injunction, now so common, and will afford an effective substitute for many of the more cumbersome and expensive proceedings which now are considered unavoidable."

We respectfully submit that plaintiffs in this case were entitled to a declaration regardless of any prayer for injunctive relief or the right to coercion. When the declaration is made as to the validity *vel non* of union, it must be assumed that no party to the litigation will violate the law as declared and leave undone those things that ought to be done, or do those things which ought not to be done. Mr. Justice Reed, in *Milk Drivers' v. Meadowmoor Dairies, Inc.*, U. S. Law Week, Feb. 10, 1941, 4187, said:

> "It is a postulate of reasoned thinking that the judicial decrees will be faithfully carried out."

12.

NO SUFFICIENT GROUND EXISTS FOR GRANTING WRIT OF CERTIORARI

We submit that the existence of a diversity of citizenship, an actual controversy and the requisite jurisdictional amount created Federal jurisdiction, and it was the duty of the District Court to retain jurisdiction and to ascertain, by a consideration of the merits, whether the questions in controversy could be better settled in the Federal or State Courts. *Brillhard v. Excess Insurance Co., Law Ed. Advance Opinions, U. S. Supreme Court*, Vol. 86, No. 15, page 1136.

No one of the reasons assigned in support of the petition for certiorari comes either within the letter or the spirit of

the reasons suggested or foreshadowed by Rule 38, paragraph 5 of the Rules of this Court. There is here no showing that the decision complained of is in conflict with the decision of another Circuit Court of Appeals, on the same matter, or that the court has decided any question of local law in conflict with applicable local decisions or even that the court has decided any question of local law whatsoever. It is not shown that the court has decided an important question of Federal law which has not been but should be settled by this court, or that the decision complained of is in conflict with any applicable decision or decisions of this court. On the contrary, the decision complained of is in harmony with the principles early announced by this court in *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 666; *Smith v. Swormstedt*, 16 Howard, 288, 14 L. Ed. 942; *Helm v. Zarecor*, 222 U. S. 32; *Sheppard v. Barkley*, 247 U. S. 1, and is fully justified by the Federal Declaratory Judgment Act. (U. S. C. A. Title 28, Section 400). Furthermore, the granting of the petition, we respectfully submit, would be contrary to many decisions of this Court expressly holding that ordinarily the writ is issued only after a final decree in the Circuit Court of Appeals. For brevity, we refer to the decisions listed in U. S. C. A. Title 28, Paragraph 347, pages 363-364, Note 24, and particularly the following:

> "The Supreme Court 'ordinarily refuses a petition for certiorari in the early stages of a case.' *Burget v. Robinson* (Mass. 1903) 123 Fed. 262, 59 C. C. A. 260.
>
> "The writ is ordinarily issued only after a final decree in the Circuit Court of Appeals. *American Constr. Co. v. Jacksonville, etc., R. Co.* (Fla. 1893) 148 U. S. 372, 13 S. Ct. 758, 37 L. Ed. 486; *The Conqueror* (N. Y. 1897) 166 U. S. 110, 17 S. Ct. 510, 41 L. Ed. 937; *Panama R. Co. v. Napier Shipping Co.* (N. Y. 1897) 166 U. S. 280, 17 S. Ct. 572, 41 L. Ed. 1004."
>
> " 'Except in extraordinary cases the writ is not issued until final decree.' *Hamilton-Brown Shoe Co. v.*

Wolf (Mo. 1916) 240, U. S. 251, 36 S. Ct. 269, 60 L. Ed. 629."

" 'This court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.' *American Constr. Co. v. Jacksonville, etc., R. Co.* (Fla. 1893) 148 U. S. 372, 13 S. Ct. 758, 37 L. Ed. 486."

Here the mandate of the Circuit Court of Appeals has already been issued and the cause ready for presentation to the District Court. Under Rule 57 of the Rules of Civil Procedure, "the court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar." The very purpose of the act is to provide a remedy at the very inception of differences or controversies, and to avoid multiplicity of suits. Respondents have already been delayed in getting to the merits of this controversy. Petitioners are under no injunction. They are asserting, and can assert, every right and reserve any possible exception in the progress of the litigation, subject to final review by the Circuit Court of Appeals, and this Honorable Court. Petitioners, therefore, will have their day in court on jurisdictional questions and any others arising in the progress of the litigation. No good reason, therefore, has been assigned for the exercise of this court's discretion in granting the petition, and therefore prolonging the litigation. It might be different if the court below had granted the temporary injunction. Thus far, petitioners have not been hurt.

WHEREFORE, respondents submit that the judgment of the Circuit Court of Appeals was correct; that no suf-

ficient ground for the grant of the writ of certiorari is assigned, and that the petition therefor should be denied.

Respectfully submitted,

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I, Collins Denny, Jr., of counsel for petitioners, acknowledged receipt of copy of the foregoing Response of Clare Purcell, et al, with Supporting Brief, this the ..... day of July, 1942.

COLLINS DENNY, JR.,
Of Counsel for Petitioners.